Supreme Court, U.S.
FILED

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Supreme Court of the United States OFFICE OF THE CLERK

October Term, 1994

No.

GAETANO MIELE and DOROTHY MIELE, husband and wife; MARGUERITE CHERIPKA, Individually and on behalf of the Estate of James Cheripka,

Petitioners

v.

PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION, AND METALAN ERECTORS, INC.

Respondents

Petition For A Writ of Certiorari To The United States Court of Appeals For The Third Circuit

PETITION AND APPENDIX FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This is a consumer protection case brought by and for purchasers of 293 fully furnished "luxury" condominium units at a 32-story high-rise structure built at the Boardwalk in Atlantic City. Due to construction defects and building code violations, the apartments were wet, musty, unventilated, and many uninhabitable. Persons, investors, retirees, and married couples from Pennsylvania, Connecticut, New York, New Jersey, and generally from among the States--some losing their life savings--allege that the units were promoted and sold by false and deceptive statements and closing documents placed in the mails or shipped to their homes via Federal Express and other interstate carriers. Defendants--builder, sponsor, lender, architects, sponsor's mortgage subsidiary-

-inducing sales by offers of a 90% mortgage, knew of the defects in advance but had huge sums at stake and knowingly decided to proceed with the promotion and sale of the units without disclosure. In granting summary judgment to each of the defendants, did the Federal District Court fail to carry out a firm Congressional policy shown, e.g., by the Interstate Land Sales Full Disclosure Act, 15 U.S.C., §1701, et.seq., and by the penalties for frauds and swindles done by mail, 18 U.S.C., §1341, to prevent false and deceptive practices in the interstate sale of real estate?

2. Did the Third Circuit, by affirming a summary judgment, fail to rescind plaintiffs' Atlantic Palace purchases, leave defendants with their wrongful gains, and thereby depart from decisions of the First and Second Circuits upholding Congressional policy on

fraudulent interstate sales?

3. Where the purchasers' actions to rescind and for damages were consolidated, and many of the claims were settled under an agreement reached between defendant and the condominium's board of directors, was the summary judgment entered against the appellants (nonsettling unit owners) on the stated ground that their individual cases required further expert reports and expert proofs at trial

(a) a misuse of Rule 56 by denying access to the Court to the nonsettling unit owners?

(b) a radical departure from the accepted course of judicial proceedings in denying summary judgment in cases involving disputed facts on well-pleaded issues?

(c) a misconception that plaintiffs could not at trial adduce, subpoena, and otherwise rely on expert reports, official

investigations, defendants' admissions in depositions, and other proofs of the defects developed in extensive discovery?

(d) in actuality, a drastic, manifestly unjust sanction against the nonsettling plaintiffs for their decision as unit owners not to settle but to seek rescission of their individual purchases?

PARTIES

Pursuant to R.14(b), the parties to the consolidated actions in the Federal District Court were James Cheripka and Marguerite Cheripka, husband and wife; Anthony Guzman and Thelma Guzman, husband and wife; Gaetano Miele and Dorothy Miele, husband and wife; Hsien Pin Mung; Thomas Traino and Joann Traino, husband and wife; Albert Algazi and Judith Algazi, husband and wife; Steffan A. Franklin and Geraldine Franklin, husband and wife; Rajinder P.S. Chawba and Satinder K. Chawba, husband and wife; Sukhdev S. Bhalla and Sulochana Bhalla, husband and wife; Bhuleshwar S. Darji and Sushila B. Darji, husband and wife, joint owners; William Tilley and Louis Pulgrano, joint owners; Kent P. Hastings and Joanne M. Hastings, husband and wife; Stephen J. Barberino, Sr., Joseph D. Arute, Stephen J. Barberino, Jr., joint owners; and

Stephen J. Barberino, Jr.; known as the "Portagallo Group" of unit owners. They were permitted to intervene in the Wright action in the District Court where all claims of unit owners and of the Atlantic Palace board of directors were consolidated due to the similarity of the unit owner claims made in the state and federal courts.

Defendants in the consolidated federal action included the builder, Perini Corporation; the bankrupt sponsor, Resort Development Corporation ("RDC"); an institutional lender offering to finance unit owner purchases, Meridian Mortgage Corp.; architects, Stevens & Wilkinson, Inc.; and the following Perini subcontractors: Altman Carpentry, Inc.; Alumiline Corp.; Vistawall Architectural Products, Divs. of Butler Mfg. Corp; Anastasi Brothers; Atlantic Plate Glass; Claremont Interior; Joseph Fabi, Inc.;

H.H. Robertson Div. of Western Architectural Systems; Labov Mechanical Contractors; I.C. Thomasson Associates, Inc.; Keystone Engineering Corp.; Stanley D. Lindsay & Associates, Limited; Mid State Filigree Systems; Lipsteel Fabrications; Harry S. Peterson Company; Rich Fire Protection; Daniel Sanders & Company; Thomas Roofing and Sheet Metal, Inc.; and R. Wigand & Sons.

Other defendants in the District Court were U.S. Capital Corporation; Atlantic Palace Condominium Association; First Resorts of New Jersey, Inc.; John Doe, a fictitious name; XYZ Corporation, a fictitious corporate name; the sponsor's president and other officers responsible for false representations; and the sponsor's sales agents, together with the following defendants providing construction surety bonds: Fidelity and Deposit Company of Maryland; North

American Reinsurance Corp.; and Prudential Reinsurance Corp.

Prior to RDC's bankruptcy, the Hastings entered into a separate settlement with the sponsor for rescission of their sale and for the recovery of their fees and costs; when the settlement was breached by RDC's bankruptcy, the Hastings joined in the appeal to the Third Circuit, but their case for breach of the settlement was dismissed for lack of standing, and they are not petitioners here.

Atlantic Palace Condominium Association, Inc., took no position on petitioners' appeal to the Third Circuit.

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IN THE

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No.

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PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION, AND METALAN ERECTORS, INC.

Respondents

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Gaetano Miele and Dorothy Miele, his wife, and Marguerite Cheripka, individually and on behalf of

the estate of James M. Cheripka, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 29, 1994.

OPINION BELOW

The Judgment of the Court of Appeals appears in the Appendix hereto. The Judgment of the Third Circuit affirmed the opinion and summary judgment dismissing petitioners' cases entered in the United States District Court for the District of New Jersey. The District Court's opinion is contained in a United States Magistrate Judge's letter Report and Recommendation filed June 17, 1993; the District Court's interlocutory order dismissing petitioners' complaint for the reasons set forth in the Report and Recommendation, dated June 25, 1993; and the District Court's final order of dismissal entered

December 3, 1993. The Report and Recommendation, opinion, and interlocutory and final judgments of the District Court also appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 29, 1994. This Court's jurisdiction is invoked under 28 U.S.C., §1254, of the Judicial Code, authorizing review by this Court by writ of certiorari of cases decided in the courts of appeals upon the petition of any party to the action, before or after rendition of the judgment or decree. The basis for federal jurisdiction in the court of first instance was an order entered by the United States Magistrate dated October 25, 1990, granting the motion of petitioners and other unit owners to intervene as a matter of right under Fed.R.Civ.P.24(a) in the case brought by the condominium board

of directors and other unit owners, entitled Donald W. Wright, et al v. Perini Corporation, et al, Docket No. 90-189, insofar as their complaint sets forth the same claims and names the same defendants.

STATUTORY PROVISIONS INVOLVED

1. ***United States Code, Title 18:***
§1341. Frauds and Swindles

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell. . .any counterfeit or spurious. . .security or other article . . ., places in any post office. . .any matter or thing whatever to be sent or delivered by the Postal Service. . .shall be fined or imprisoned not more than five years, or both. If the violation affects a financial institution, such persons shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

2. ***15 U.S.C., §1701-1720 (1988); Interstate Land Sales Full Disclosure Act***

3. ***N.J.S.A.46:8B-4. Status of units.***
"Each unit shall constitute a <u>separate parcel of real property</u> which may be dealt with by the owner thereof in the same manner as is otherwise permitted by law for any other parcel of real property." (Emphasis added)

CIVIL PROCEDURE RULES INVOLVED

1. ***Fed.R.Civ.P. 56(c) - Summary Judgment***
"(c) Motion and proceedings thereon. . . .The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on

file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

2. ***Fed.R.Civ.P.56(f):***

"(f) When affidavits are unavailable. Should it appear . . .that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits . . .depositions. . . or discovery. . .or may make such other order as is just." (Emphasis added)

STATEMENT OF THE CASE

This litigation arises out of the marketing, financing, and sale of defective condominium units at the Atlantic Palace 293-unit condominium by defendants commencing in 1986. Because of construction defects and difficulties, the condominium association, through its board of directors, filed this action in the Federal District Court for the District of New Jersey in an action entitled Donald W. Wright, et al v. Perini Corp., et al, Civil No. 90-189 (JEI)(Consolidated). The petitioning unit owners were interveners in the Wright litigation. There was extensive discovery taken in the Wright litigation, and there were numerous admissions on file on the basis of which the action, and the various construction defects, could be proved at trial. In addition, the condominium association, in

conjunction with RDC, Perini, and Meridian, had caused investigations to be made as to the problems at the condominium.

One of these reports, that of Zetlin-Argo Structural Investigations, Inc., concluded as to the defects in construction, as follows:

> "They do not provide tenants with minimum requirements for comfort and health:
>
> a. Lack of ventilation has contributed to growth of fungus (mold).
>
> b. Lack of ventilation has contributed to existing unpleasant odors throughout the Tower.
>
> THE ATLANTIC PALACE RESIDENTIAL UNITS WERE NOT PROVIDED WITH VENTILATION AIR AS DEFINED AND MANDATED BY THE CODE AND IN COMPLIANCE WITH ACCEPTED PRACTICE."

The purchasers included retirees, married couples seeking second homes, and other persons and investors not only from Pennsylvania and New Jersey, but from

among the States, and many of them had used, and were about to lose their life savings, particularly if it is the case that the units cannot be readily repaired. The action involved both the individual claims of unit owners and the claims of the board of directors of the condominium association for the defects and damages to the common elements. With respect to the common elements, the case was essentially a class action brought for all 293 unit owners. This was not the case, however, with respect to the losses and damages sustained by each of the plaintiff unit owners. Their individual condominium units had been purchased as separate parcels of real estate and were treated as such under the New Jersey Condominium Act, N.J.S.A.46:8B-1, et seq.

The action was mediated in the District Court, and a settlement agreement involving a compromise among the settling

parties, including the condominium's board of directors, emerged. A sum in excess of $10 million was promised in the settlement to fund extensive repairs to be made and paid for by the board. The settlement also involved certain more favorable lending terms offered by Meridian Mortgage in compromise of any further liability by it to the settling owners. It had financed and promoted many of the purchases with full knowledge of the defects.

The settlement agreement, however, did not involve defendants' willingness to rescind any of the sales or refund of purchase monies, as had earlier been arranged for by the Hastings in their separate settlement with the bankrupt sponsor. In addition, a number of the unit owners feared that the $10 million promised in the settlement would be insufficient to correct the defects. The water problems, ventilation difficulties,

and other defects had caused extensive infiltration, excess humidity, and damage to carpets, wall coverings, and furniture, and there were continuing problems of mustiness, condensation, and odors largely due to the lack of an adequate ventilation system built to comply with local building codes.

Defendants filed three summary judgment motions in the District Court against the non-settling unit owners. They were represented by the same attorney who was appearing for those unit owners agreeing to the settlement, and a continuance was plainly required, as a matter of fundamental fairness and justice to litigants, to enable the non-settling unit owners, the petitioners here, to obtain the assistance of counsel to represent them in opposition to defendants' motions and to take the necessary measures to preserve their claims.

Nevertheless, despite extensive discovery taken in the consolidated actions, the District Court routinely granted defendants' summary judgment motions, failing to recognize the essentiality of insuring that the non-settling unit owners were being effectively represented by independent counsel. It was ruled that the non-settling unit owners' claims "cannot be established without the aid of expert testimony" and, on the ground that the attorney had failed to submit separate experts' reports by an established deadline, a United States Magistrate recommended that the cases be dismissed. This was despite the explicit finding in the Magistrate's report as follows:

> "The experts' reports prepared in this action are voluminous and reveal the inherent complexity of a case involving the structure, engineering, and design of a 30 story complex." (Magistrate's Report, at p.5)

Finding further that the unit owners had no right to use the expert reports obtained by their own association's directors, the Magistrate determined that proof of the water, leakage, vermin, fungi, contaminants, and other odors and problems at the condominium were not anticipated as adequate proofs at trial, and an outright dismissal was recommended.

Upon the recommendation that the anticipated lack of expert testimony at trial would be "fatal to their cause of action", the District Court granted a summary dismissal of the non-settling unit owner cases in an interlocutory order entered on June 25, 1993. Finding that the claims of the third, fourth, and fifth parties had been settled, the District Court entered a final judgment dismissing all of the Atlantic Palace consolidated actions, with prejudice, on December 1, 1993. The Third Circuit Court of Appeals

affirmed the dismissal without opinion.

The Mieles had purchased their unit #601 for $235,000 in 1988. The Cheripkas purchased their unit #2910 for $172,000 in 1987. The dismissals ordered by the lower courts left them remediless. This was despite the cartons of depositions that had been taken and despite proof of the mailings by which the defendants had promoted and marketed the units.[2]

REASONS FOR GRANTING THE WRIT

1. THE DECISIONS BELOW CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO ENFORCEMENT OF THE CONGRESSIONAL POLICY TO PREVENT FALSE AND DECEPTIVE PRACTICES PROMOTING PROPERTY SALES BY USE OF MAIL AND OTHER INTERSTATE FACILITIES AND GIVING A BROAD APPLICATION TO 18 U.S.C., §1341

Undisclosed either to the unit owners or

---

[2] For example, in a mailing dated March 31, 1987, to her Paramus office, Marguerite Cheripka was advised that the Atlantic Palace would be "an elegant self-contained resort with all the amenities and conveniences of a fine hotel." In another promotional distribution, the project was described as a "palatial 30-story condominium" that "now towers over the Atlantic City skyline."

to the public was that the defendants had been aware in the Fall of 1986 and in the early months of 1987 that there were substantial water infiltration and ventilation problems at the condominium, rendering the units subject to leakage and, because of mustiness and lack of ventilation, virtually uninhabitable, particularly to older couples nearing retirement.

After purchase by the Mieles, there were abundant proofs of the inspections and expert reports of the problems, not to mention a letter written to the Mieles stating the water problems are so severe that they are having a damaging effect on the long-term reputation of the Atlantic Palace. It seemed that the individual apartments had been provided with heat pump units. The windows were fixed, and the result was that there was no outside air serving to provide circulation.

Without natural ventilation, the building failed utterly to comply with BOCA building requirements.

Meridian's senior vice president, James Fogarty, testified in a deposition that Meridian had received a fee of 1.5% on a $44,500,000 loan "on the front end", and he further admitted "we made a determination to move the project forward . . .keep them [the mortgage loans] in portfolio hopefully for some period of time and then at a later date package them ourselves. . . ." As of the time of his deposition, Meridian still owned $23 million in mortgages on Atlantic Palace units.

It was plain that the petitioners' case was brought for defendants' fraud and nondisclosure. Each of them had knowledge of the water infiltration and ventilation problems prior to the individual condominium sales. Instead of disclosing

such problems, defendants, because of the substantial amounts involved and invested in the project, knowingly elected to go forward with the sales and closings without disclosure. Any anticipated lack of expert testimony at the trial was not "fatal" to this claim.

The policy of the law--to prevent false and deceptive practices in the interstate sale of real estate--has been provided by Congress. In 18 U.S.C., §1341, entitled "Frauds and Swindles", Congress broadly provided:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . . places in any post office. . .any matter or thing whatever to be sent or delivered . . .shall be fined. . . or imprisoned. . . ."

In United States v. Rendini, 738 F.2d. 530 (1st Cir. 1984), it was held that the

purpose of this provision of the mail fraud statute is to protect the integrity of the mails. In its regulation of commerce among the States, Congress has seen fit to provide that the mails are not to be used to implement fraudulent schemes "of any kind". Id., 738 F.2d, at p.533.

Neither can the dismissal ordered below be reconciled with the decision of the Second Circuit in United States v. Amrep Corp., 560 F.2d 539 (2d Cir. 1977). Amrep dealt with the sale of unimproved parcels, but the facts were otherwise similar to those involved here. The defendants-developers had purchased, for $17.8 million, a large tract of land known as Rio Rancho Estates, some 15 to 20 miles northwest of Albuquerque. They converted the tract into 77,000 lots, and the lots were sold to defrauded purchasers, many not living in New Mexico. The buyers, for example, were falsely told that

Albuquerque was "bursting at the seams" with people and could grow only in one direction, to the northwest, because the city was surrounded on the other three sides by mountains or by government lands. Sales agents represented that Rio Rancho was "where the City must grow to, grow into, and grow out of." 560 F.2d, at 543. The defendants realized $170 million in sale proceeds, nearly 10 times more than the cost of the tract. Various promotions had been undertaken in which purchasers were told that principles of financial leverage could produce gains to the lot purchasers of 150% annually. Compare the representations made here that under Meridian Mortgage financing, 90% of the purchase costs could be borrowed under first mortgage loans provided by the sponsor's institutional mortgage lender.

The Second Circuit held:

"A scheme to defraud may consist

> of numerous elements, no particular one of which need be proved if there is sufficient overall proof that the scheme exists." 560 F.2d, at 546.

The Court held that the overall scheme to defraud had been shown by the proofs and that the case made for the lot purchasers was one that was properly submitted to the triers of the fact. It held:

> "The bona fides which appellants assert is demonstrated by their program. . .permitting the exchange of unimproved for improved property was also for the triers of fact." Id., at p.544

The Court stated:

> "[Appellants] confused the scheme to defraud, which is the gist of the offense, with the means adopted to effectuate that scheme." Ibid.

The issue of the existence vel non of a scheme among the defendants to defraud was held to be a fact issue, for lay testimony by the lot purchasers, and there was no mention of the necessity for expert

testimony to determine the facts.

From the standpoint of Congressional intent to prohibit the use of interstate commerce and the mails to promote a false and fraudulent scheme to sell "any matter or thing whatever", it is impossible to reconcile the First Circuit's decision in Rendini and the Second Circuit's decision in Amrep with the dismissals of the petitioners' cases ordered below. Amrep is, of course, factually distinguishable to the extent that it deals with the sale of unimproved tracts of land as opposed to the sale in interstate commerce of furnished units in a vertical condominium regime containing separate parcels of real estate. There is no question but that the Interstate Land Sales Full Disclosure Act, 15 U.S.C., §1701-1720 (hereinafter "the Disclosure Act"), was designed to prevent false and deceptive practices in the sale of unimproved tracts of land. See, for

example, limiting its application, Flint Ridge Dev.Co. v. Scenic Rivers Ass'n., 426 U.S. 776, 96 S.Ct. 2430, 49 Law Ed.2d 205 (1976), Reh.Den. 429 U.S. 875, 97 S.Ct. 198, 50 L.Ed.2d. 159 (1976).

But the factual difference--improved vs. unimproved parcels--is not material in Congress' determination to prevent false and fraudulent practices being used in sales made in interstate commerce. As held in Olsen v. Lake Country, Inc., 955 F.2d 203 (4th Cir.1991), a suit by purchasers of lots against a corporate vendor for violations of the Disclosure Act, the language of the Act is to be read in the light of its purpose and the evil to which it was addressed:

> "More important, is the undisputed purpose of the Act to prohibit fraud and to protect purchasers of land which is part of a common promotional scheme. . . .The language of the Act is meant to be read broadly to effectuate this goal." 955 F.2d, at 205.

Similarly, in Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444 (11th Cir. 1985), the scope of the Disclosure Act was not limited to the sale of raw land. In Olsen, instead of ventilation and water leakage difficulties, water and sewer service to the lots sold was found to be grossly inadequate to meet the needs of all of the lots in the development, contrary to the developer's representations.

Examine the logic of a legal system that protects interstate purchasers of unimproved lands against fraud by developers, but at the same time, dismisses cases involving false and deceptive promotions by condominium developers on summary judgment for an anticipated inability to produce at trial experts hired and paid for individually by the unit purchasers. Petitioners submit that the fact that the Disclosure Act does

not in terms apply to the sale of unimproved tracts does not confer a license on condominium land developers to engage in fraud actionable at common law if for any reason not within the scope of the frauds and swindles prevented in interstate commerce by the statutory sanctions against mail fraud.

II. THE UNIT PURCHASERS WHO DEEMED THE SETTLEMENT INADEQUATE TO COMPENSATE FOR THEIR LOSSES WERE REMEDILESS IF DENIED ACCESS TO THE COURT; THE LOWER COURT SHOULD NOT HAVE IMPOSED THE MOST DRASTIC SANCTION OF ALL--DISMISSAL OF THEIR CASES--FOR THEIR REFUSAL TO ACCEPT DEFENDANTS' SETTLEMENT TERMS

There can be no question but that it is the policy of the law to dispose of litigation on fair and reasonable terms if at all practicable and that the law favors the settlement and compromise of disputed claims, as was entered into in this case between defendants, the board of directors, and many of the Atlantic Palace unit owners. Nor do we say that the entry

into a compromise in settlement by other parties should be deemed to constitute evidence against the defendants or to serve as a basis for denial of a properly framed summary judgment motion.

In this case, the petitioners deemed the settlement terms to be inadequate and insufficient to compensate for their individual losses. True enough, it was possible that the costs of repair of the common elements would be less than $10 million and thus sufficient. But the other possibility is equally admissible: That the cost of repairs of the common elements would be so great that there would be no payment left to compensate the individual unit owners for their losses, diminished values, and inability to rent. Mediation, compromise, and settlement, as productive as they are, may not accomplish a fair and just outcome in a given dispute, and a defendant's settlement

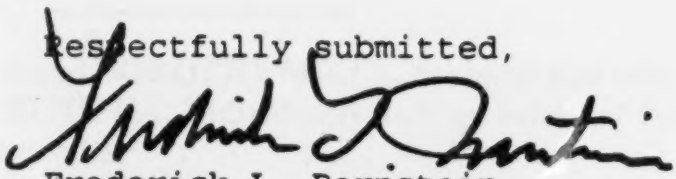
terms may not involve a remedy that is in an amount that is sufficient to deter antisocial conduct.

But the dismissal of a non-settling plaintiff's case, on motion before trial, for lack of expert reports on matters that all persons can see and understand, is the most drastic of all sanctions available to a court. We urge that the petitioners should have been afforded the effective assistance of independent counsel, not involved in the settlement, to oppose defendants' summary judgment motions, and that the District Court should not have left the petitioners virtually defenseless against the settling parties. To do otherwise, to fail to grant a continuance on defendants' motions to dismiss, was a radical departure from the accepted course of federal judicial practice in denying summary judgment in cases involving disputed facts and well-pleaded issues.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Third Circuit.

Respectfully submitted,



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Respondents

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-5021

RESORT DEVELOPMENT CORPORATION

v.

PERINI CORPORATION, ET AL

* * *

District Court Civil No. 90-CV-00189

GAETANO MIELE and DOROTHY MIELE, husband and wife; MARGUERITE CHERIPKA, individually and for and on behalf of the Estate of James Cheripka, Deceased,
Intervenors-Appellants

KENT P. HASTINGS and JOANNE M. HASTINGS, husband and wife,
Appellants

Appeal from the United States District Court for the District of New Jersey
(Civil No. 90-cv-00189)
District Judge: Honorable Joseph E. Irenas

Entered: December 29, 1994

Submitted Pursuant to Third Circuit LAR 34.1(a)

December 16, 1994
Before: BECKER, GREENBERG and McKEE, Circuit Judges

JUDGMENT ORDER

After consideration of all contentions raised by the appellants, it is

ADJUDGED AND ORDERED that the judgment of the district court entered December 1, 1993, be and is hereby affirmed.

It is also ADJUDGED AND ORDERED that the appeal of Kent P. Hastings and Joanne M. Hastings is dismissed for lack of standing. See Marino v. Ortiz, 484 U.S. 301, 304 (1988).

Costs taxed against appellants.

BY THE COURT:

/s/
Circuit Judge

ATTEST:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

Dated: Dec. 29, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE
HONORABLE JOSEPH E. IRENAS

Entered on the Docket: December 3, 1993
Filed: December 1, 1993

RESORT DEVELOPMENT CORP., :

Plaintiff, : Civil No. 89-4973

v. :

PERINI CORP., et al :

Defendants

DONALD W. WRIGHT, et al :

Plaintiffs : Civil No. 90-0189

v. :

PERINI CORP., et al :

Defendants

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* * *

ATLANTIC PALACE CONDOMINIUM ASSOCIATION, :

: Civil No. 90-1003

Plaintiff

v. :

PERINI CORP., et al :

Defendants.

ORDER OF DISMISSAL

The Court having been advised by the parties that the claims of all parties, including crossclaims, counterclaims, third, fourth and fifth party claims, have been settled, except for the claims of those parties which were dismissed by the Court's prior Orders of June 25, 1993 and September 3, 1993,

IT IS on this 1st day of December, 1993;

ORDERED that the above-captioned consolidated matters be and hereby are dismissed, with prejudice, and without costs to any party.

/s/ Joseph E. Irenas
JOSEPH E. IRENAS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
CAMDEN VICINAGE
HONORABLE JOSEPH E. IRENAS

Entered on the Docket: 6-28-93
Original Filed: June 25, 1993

RESORT DEVELOPMENT CORP., :

Plaintiff, : Civil No. 89-4973

v. :

PERINI CORP., et al :

Defendants

DONALD W. WRIGHT, et al :

Plaintiffs : Civil No. 90-0189

v. :

PERINI CORP., et al :

Defendants

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* * *

ATLANTIC PALACE CONDOMINIUM ASSOCIATION, :

: Civil No. 90-1003

Plaintiff

v. :

PERINI CORP., et al :

Defendants. :

O R D E R

This matter having been submitted by Report and Recommendation by the Honorable Joel B. Rosen, United States Magistrate Judge, pursuant to 28 U.S.C. §636(b)(1) and the court having considered the objections thereto, and for the reasons noted in the Report and Recommendation,

IT IS on this 25th day of June, 1993 hereby

ORDERED that defendant Perini Corporation's motion for summary judgment as against the Intervenor plaintiffs Gaetano Miele, Dorothy Miele, James Cheripka and Marguerite Cheripka is GRANTED. It is

FURTHER ORDERED that judgment is ENTERED against Gaetano Miele, Dorothy Miele, James Cheripka and Marguerite Cheripka on the intervenors' complaint in civil action no. 90-189. It is

FURTHER ORDERED that defendant Stevens & Wilkinson, Inc.'s motion for summary judgment as against the Intervenor plaintiffs Gaetano Miele, Dorothy Miele, James Cheripka and Marguerite Cheripka is GRANTED. It is

FURTHER ORDERED that judgment is ENTERED against Gaetano Miele, Dorothy Miele, James Cheripka and Marguerite Cheripka on the intervenors' complaint in civil action no. 90-189. It is

FURTHER ORDERED that the motion of I.C. Thomasson, Inc. on the third-party complaint is DENIED AS MOOT. It is

FURTHER ORDERED that judgment is ENTERED in favor of I.C. Thomasson, Inc. on S&W's third party complaint in civil action no. 90-189. It is

FURTHER ORDERED that the motion of Stanley D. Lindsey & Associates, ltd. on the third-party complaint is DENIED AS MOOT. It is

FURTHER ORDERED that judgment is ENTERED in favor of Stanley D. Lindsey Associates, Ltd. on the third-party complaint in civil action no. 90-189. It is

FURTHER ORDERED that all complaints of the above named intervenors in civil action no. 90-189 are DISMISSED WITH PREJUDICE.

No costs.

/s/ Joseph E. Irenas
JOSEPH E. IRENAS
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

June 17, 1993

Honorable Joseph E. Irenas
United States District Judge
401 Market Street
Camden, NJ 08101

Re: Donald W. Wright, et al v. Perini Corp., et al; Civil No. 90-189 (JEI) (Consolidated)

REPORT AND RECOMMENDATION

Dear Judge Irenas:

This Report and Recommendation is being submitted pursuant to 28 U.S.C. §636(b)(1)(B) upon four motions for summary judgment against four intervenor plaintiffs, James Cheripka and Marguerite Cheripka, and Gaetano Miele and Dorothy Miele (hereinafter "Intervenors"). Defendants Perini Corporation (hereinafter "Perini") and Stevens & Wilkinson, Inc. (hereinafter "S&W") seek summary judgment against the above named Intervenors. Third party defendants Stanley D. Lindsey

& Associates, Ltd. (hereinafter "Lindsey") and I.C. Thomasson Associates, Inc. (hereinafter "I.C. Thomasson") also move for summary judgment. These motions will be determined on a Report and Recommendation basis pursuant to 28 U.S.C. §636(b)(1)(B) because of the potentially dispositive nature of the requests.

After careful consideration of the submissions and oral arguments of the parties, and of the record as a whole, and for the reasons noted below, I respectfully recommend granting Perini's and S&W's motion for summary judgment as against the Intervenors and entering judgment in favor of S&W and Perini on the intervenor complaint. Because this ruling necessarily moots the other claims in this action, I also recommend entering judgment in favor of third party defendants Stanley D. Lindsey and I.C. Thomasson.

I. Background and Procedure

On January 19, 1990 suit was brought in the case of Donald W. Wright, et al v. Perini Corporation, et al, Civil Action No. 90-189. In that action a group of several hundred condominium unit owners brought suit against the constructor and architect of the Atlantic Palace alleging negligence and breach of warranty in the construction and design of the Atlantic Palace. On October 25, 1990 I granted Joseph Portogallo and twelve other unit owners the right to intervene in the Wright case.[1] On November 13, 1990 the intervenor complaint was filed.

The Atlantic Palace is a thirty story hotel-condominium complex located on the boardwalk in Atlantic City, New Jersey. Construction on this high-rise project began in September of 1985, and the

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[1]Only four of the original Portogallo group remain in this case. The remaining intervenors have tentatively accepted the proposed settlement. See infra at 4.

project was substantially completed by February of 1987. The building consists of a thirty story tower section and a three story low rise section. The low rise section of the project includes area to be leased as commercial space to small businesses. The tower portion of the project includes 293 residential condominium units.

Resorts Development Corporation (hereinafter "RDC"), a wholly owned subsidiary of U.S. Capital Corporation, was the developer and promotor of the condominium project. In 1985, RDC contracted with Perini Corporation to build the Atlantic Palace. U.S. Capital Corporation contracted with Stevens & Wilkinson, Inc., to design and supervise the construction of the Atlantic Palace.

Perini was the general contractor on the project. S&W was the architect who designed the building assisted by I.C.

Thomasson, the mechanical engineering consultant and Lindsay the structural engineering consultants.

Counts I and II of the intervenor complaint contain claims for negligence against Perini. These counts state that Perini's construction was performed in a negligent and unworkmanlike manner. These counts also state that Perini negligently deviated from the construction contract and from existing building and design standards in constructing the Atlantic Palace (Intervenor Compl., Counts I and II). The Intervenors further allege that Perini's negligence resulted in the Atlantic Palace containing numerous deficiencies including "water infiltration into plaintiff's unit, malfunctions, defects and omissions in construction, gross sealant failure and otherwise..." Id., Count I, 5.

Counts III, IV and V state claims

against S&W, the architect. In Count III the Intervenors allege that S&W failed to properly design and supervise the construction of the Atlantic Palace. In Counts IV and V, the Intervenors contend that S&W breached its duty to supervise the construction of the work and failed to discover the defects in the contractor's work in a timely fashion. Count V also states that S&W breached warranty claims under their contract.[2]

Both S&W and Perini answered the intervenor complaint, denying all material allegations. S&W impleaded I.C. Thomasson and Lindsey. There is no dispute that the Atlantic Palace has experienced extensive water infiltration problems since 1987. There is no general agreement, however, on the cause of the water infiltration.

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[2]The Intervenors do not have a contractual relationship with either Perini or S&W. Accordingly, the contracts are only relevant insofar as any negligent deviation therefrom can be used to support the Intervenors' negligence claims.

After an extensive mediation process, all but four of the intervenors and approximately 200 of the other residential condominium unit owners have tentatively settled all claims against the named defendants. The present motions seek summary judgment against the remaining four intervenors - James Cheripka and Marguerite Cheripka, and Gaetano Miele and Dorothy Miele. On November 12, 1992 this court severed the intervenors' claims to proceed to trial. A trial date has not been set pending disposition of the outstanding motions.

I have closely managed discovery and case management in this action. To this end, I have entered several orders establishing deadlines for the exchange of experts' reports. Initially, the plaintiffs were to submit their experts' reports by July 1, 1991, and the defendants were to submit their experts'

reports by October 1, 1991. The deadline for defendants' experts' reports was later extended to December 1, 1991, and then to January 6, 1992. The subcontractors' experts' reports were initially due on March 1, 1992, and that deadline was extended to May 1, 1992.[3]

The experts' reports prepared in this action are voluminous, and reveal the inherent complexity of a case involving the structure, engineering and design of a thirty story complex. All of the parties in this case recognize that the liability, causation and damages issues require expert testimony. (Plfs.' Memo. in Opp. to Mot. for Summary Judgment at 5).

Despite the passage of the deadlines for discovery and the retention of experts, the Intervenors have not retained

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[3]The subcontractors are parties to the other litigation involving the Atlantic Palace, but are not parties to the intervenor complaint.

an independent expert. Their brief in opposition to the pending motions is devoted entirely to the contention that they will be utilizing experts retained on behalf of the plaintiff Atlantic Palace Condominium Associates ("the Association") to support their claims. The Intervenors maintain that as unit owners and members of the Association they can utilize the Association's experts and consequently, they did not retain independent experts.[4] Id. at 2,6.

However, the record reveals that the Association's experts will not testify on

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[4] The Intervenors maintain that they will be using some or all of the following experts to establish the elements of their case and the liability, causation and damages issues: (a) Coopers and Lybrand - loss of profits and diminution on value; (b) Bernard Schwartz and Associates, engineering firm - on structural issues; (c) Rocca Associates - appraised the Atlantic Palace; (d) Burt Hill Rittelman Kosar Associates - structural, cladding, mechanical design and cost estimate reports.

Perini argues that even were the Intervenors to retain any of the above experts, none of these expert reports reference the liability of the general contractor but instead relate to proof of damages, and liability of the design team.

the Intervenors' behalf. Bernard Schwartz and Associates ("Bernard Schwartz"), one of the Association's experts, wrote Mr. Ferry on January 6, 1993, informing him, in no uncertain terms, that for conflict of interest reasons, Bernard Schwartz could not serve as their expert in this action. (See Letter from Bernard Schwartz and Associates dated January 6, 1993). Mr. Schwartz stated, "our company policy is not to participate in the same case with another attorney. There is a conflict of interest." (Letter from Bernard Schwartz, P.E., dated January 6, 1993 (emphasis in original))

This crucial fact was brought to the court's attention, not by Mr. Ferry, but by counsel for Perini, David S. Mackay, Esquire in a letter to this court dated January 29, 1993. During oral argument, held three months after Bernard Schwartz' letter, Mr. Ferry confirmed that Bernard

Schwartz would not serve as the intervenors' expert. Mr. Ferry also indicated that he had not attempted to retain an alternate expert nor did he have any present intention of doing so.[5] Thus, despite the complexity of the issues, and the concession that an expert is essential to proof of their claim, the Intervenors have not retained an expert.[6]

II. Discussion

The standard for summary judgment is

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[5]Even had Mr. Ferry sought to retain an expert at this late date, Mr. Ferry has failed to show "good cause" as to why the scheduling order should be altered to allow for this change. It is highly problematic as to whether retention of an expert at this time would be permitted. See Rule 16(b), Fed.R.Civ.P.

[6]The Intervenors offer no legal authority for the proposition that they can utilize the Association's experts merely because they paid Association dues. Moreover, this court knows of no authority which would compel an expert to testify when ethical constraints bar her from doing so. In fact, the New Jersey courts have long held that individuals cannot be compelled to give expert testimony. See Stanton v. Rushmore 112 N.J.L. 115, 116 (E & A 1934); see also Genovese v. New Jersey Transit Rail Operations, Inc., 234 N.J. Super. 375 (1989).

a stringent one. A court may grant summary judgment only when the materials of record show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Tudor Dev.Group, Inc. v. United States Fidelity & Guar.Co., 968 F.2d 357, 359-360 (3d Cir. 1992). In deciding whether there is a disputed issue of material fact, the court must resolve doubts in favor of the non-moving party. Desvi, Inc. v. Continental Ins.Co., 968 F.2d 307, 308 (3d Cir. 1992). The threshold inquiry is whether there are "any genuine factual issues that can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

A motion for summary judgment must be granted if the party opposing the motion

"fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Moreover, once the moving party has carried its burden of establishing the absence of a genuine issue of material fact, the burden shifts to the non-moving party to "set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). This burden may be discharged upon showing the absence of evidence necessary to support the non-moving party's case. Id. at 323-325. The non-moving party may not rest upon the mere allegations or denials of his pleadings, Fed.R. Civ.P. 56(e), and "must do more than simply show that there is some metaphysical doubt as to material facts." Matshuita Elec.Indus.Co. v. Zenith

Radio Corp., 475 U.S. 574, 586 (1986).

This court recently held that "material" facts are those that affect the outcome of a lawsuit under the applicable law, and material facts are "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the non-moving party. Bradgate Associates, Inc. v. Fellows, Read and Associates, Memorandum 1992 WL 88120 (D.N.J. 1992). Thus, if the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may find that no genuine issue of material fact exists and proceed to determine the case as a matter of law. Anderson, 477 U.S. at 249-250.

A. S&W's Motion for Summary Judgment as against the Intervenors.

S&W moves for summary judgment on behalf of the design group which consists of the architect, S&W, the structural

engineer, Stanley G. Lindsey & Associates, and the mechanical engineer, I.C. Thomasson.[7]

S&W maintains that in a professional malpractice action, such as the case at hand, a plaintiff must provide expert testimony from a member of the defendant's profession in order to establish that the defendant deviated from the appropriate standard of care. The Intervenors have not rebutted this contention.

In their complaint the Intervenors allege that the design group was negligent in the design and supervision of the Atlantic Palace project. Because the Intervenors' claims are unsupported by expert testimony, S&W contend that summary judgment should enter in their favor pursuant to Rule 56. I agree.

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[7]The summary judgment motions filed on behalf of Lindsey and I.C. Thomasson will be addressed later in this Report and Recommendation.

There is no general rule or policy requiring expert testimony as to the standard of care in a tort action. "The test of need of expert testimony is whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982); see also Macri v. Ames McDonough Co., 211 N.J. Super. 535, 642 (App.Div. 1986); Bushman v. Halm, 798 F.2d 651, 659 (3d Cir. 1986).[8]

When a case concerns a level of care required of a professional, the standard is usually determined on the basis of

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[8]A federal court sitting in diversity is bound apply the substantive law of the state in which it sits. Erie R.R. v. Tompkins, 304 U.S. 64 (1938). Because jurisdiction in this action is based upon diversity of citizenship, the law of New Jersey supplies the rules and principles of tort liability. See Travelers Indemnity Company v. Ewing, Cole, Erdman & Eubank, 711 F.2d 14, 17 (3d Cir. 1983).

expert testimony. Travelers, 711 F.2d at 17. Often, in a professional malpractice action, an expert may be necessary in order to establish whether the professional rendered services consistent with the standards of the profession. See Travelers, 711 F.2d at 17; Bartak v. Bell-Galvardt & Wells, Inc., 629 F.2d 523, 531 (8th Cir. 1980); Rosenberg v. Cahill, 99 N.J. 318, 325 (1985); Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982); Sanzari v. Rosenfeld, 34 N.J. 128, 134-135 (1961).

In the case of an architect, the level of care expected is that of a reasonably prudent architect. Travelers, 711 F.2d at 16. In the engineering profession, "allegations of professional malpractice must be supported by expert testimony." Bradgate Associates, Inc. v. Fellows, Reed and Associates, Memorandum 1992 WL 88120 *2 (D.N.J. 1992); Bartak,

supra; Applegate v. Dobrovir, Oakes & Gebhardt, 628 F. Supp. 378, 382 (D.D.C. 1985); Rosenberg v. Cahill, 99 N.J. 318, 325 (1985). Absence of expert testimony may be fatal in a professional negligence action if the issues are not within the common knowledge of the jurors. Bradgate, 1992 WL 88129 *2.

Under the common knowledge doctrine, expert testimony is not necessary when the negligence of the defendant is "readily apparent to anyone of average intelligence and ordinary experience." Rosenberg, 99 N.J. at 375; see e.g., Sanzari, 34 N.J. at 140. In those instances, the jury supplies the appropriate standard of care, not the expert. Id. The common knowledge doctrine is applied in malpractice actions when "the issue of negligence is not related to technical matter peculiarly within the knowledge of the [professional]." Id., (citing Sanzari, 34

N.J. at 142). Guided by these principles, I will address the present motions.

It is undisputed that expert testimony is necessary to prove that S&W deviated from the standard of professional care and practice applicable in the engineering profession. Bradgate, 1992 WL 88129 *2; Bartak, supra; Applegate v. Dobrovir, Oakes & Gebhardt, 628 F.Supp. 378, 382 (D.D.C. 1985); Rosenberg v. Cahill, 99 N.J. 318, 325 (1985). The Intervenors conceded both in their moving papers and during oral argument that they must have an expert to prove their claims against S&W, I.C. Thomasson and Lindsey. (See Plfs.' Mem. in Opp. at 11-13).

Clearly, without an expert, a rational jury could not find S&W liable. In Counts III, IV and V of the intervenor complaint, the Intervenors allege that S&W deviated from an acceptable standard of architectural care and practice in the

performance of their duties on the Atlantic Palace project. The issues relevant to the Intervenors' claim concern whether S&W rendered professional engineering services consistent with the accepted standards of the profession. Notwithstanding this fact the Intervenors have failed to come forward with an expert which they Intervenors concede is crucial to establishing their claims and unraveling the liability issues surrounding the architectural and engineering questions presented in this litigation. The Intervenors' claims are too complex and intricate for a lay person to understand without the aid of expert testimony. A lay juror could not determine whether S&W deviated from the applicable standard of care owed by an architect, analyzing blueprints, drawings and plans without the aid of expert testimony.

Moreover, S&W has presented expert reports which they contend absolve them from liability. The Intervenors cannot rebut these findings without their own expert. Accordingly, I respectfully recommend that summary judgment be entered in S&W's favor on the Intervenors' theory of liability for the negligent performance of their duties regarding the design and supervision of the Atlantic Palace.

B. Perini's Motion for Summary Judgment as Against the Intervenors.

Perini's argument for summary judgment parallels S&W's. Perini maintains that a plaintiff must present expert testimony in order to establish negligent construction on the part of the general contractor. Because the Intervenors' claims are unsupported by expert testimony, Perini maintains that the Intervenors would not be able to prove liability, causation or damages and thus

Perini is entitled to judgment as a matter of law pursuant to Rule 56. Again, I agree.

It is undisputed that the Intervenors' claims cannot be established without the aid of expert testimony. As stated previously, the Intervenors conceded in their moving papers and during oral argument that expert testimony will be required on all of their claims against Perini. (See Plfs.' Mem. in Opp. to Mot. for Summary Judgment at 11-13). The standard of care owed by a general contractor and the claims that Perini failed to use its best skill, judgment and attention in the construction of the project, the Intervenors' admit require expert testimony. Furthermore, expert testimony is necessary on the claims that Perini failed to build the Atlantic Palace in accordance with the construction contract, drawings and specifications and

also on the damage claims of lost rental profits and diminution in value. Id.

As stated in Butler v. Acme Markets, Inc., 89 N.J. 270, 283 (1982), "[t]he test of need of expert testimony is whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable." When the question of causal relationship is so esoteric that lay minds cannot form an intelligent judgment about it without expert aid, an opinion from an expert may be required. Bushman v. Halm, 798 F.2d 651, 659 (3d Cir. 1986); see also Walker Rogge, Inc. v. Chelsea Title & Guaranty Co., 122 N.J. Super. 363, 376 (App.Div. 1980) rev'd on other grounds, 115 N.J. 517 (1989) (expert required because "a valid judgment on the issue of a land surveyor's negligence could not be formed by the application of common

judgment and experience.")

While New Jersey courts have not had an opportunity to consider directly whether expert testimony is required in cases involving the standard of care owed by a general contractor, other jurisdictions have confronted the issue and have required expert testimony involving similarly complex issues. See Nelson v. Abbott, 16 Phila. 484 (C.P. 1987) (Expert testimony required to establish negligent design and construction of highway); Miller v. Los Angeles County Flood Control District, 505 P.2d 193, 202 (Ca. 1973) (Negligent construction of plaintiff's residence required expert testimony).

Categorizing Perini, the general contractor on this project as a "professional", for the purpose of requiring expert testimony, is appropriate. As the New Jersey Supreme

Court stated, "it is clear that the term 'professional services' is no longer limited to the traditional professions such as law and medicine." Autotote, Ltd. v. New Jersey Sports & Exposition Authority, 85 N.J. 363, 371 (1981). The legal rules applicable in those professions should be extended to apply in the case of general contractors. The issues and principles involved in the construction industry are usually beyond the common knowledge of the average person. For instance, compliance with building codes, the costs and benefits of various building materials, and other similar issues which inevitably arise during the construction of a modern thirty story hotel/condominium complex, require technical expertise well beyond the ken of the average person.

The Intervenors' failure to supply expert testimony in this instance is fatal

to their cause of action against Perini.

In Counts I and II of the intervenor complaint, the Intervenors allege that Perini deviated from the standard of care and the specifications of the Construction Plan in constructing the Atlantic Palace, and further that the construction was performed in a negligent and unworkmanlike manner.

The alleged negligent construction of the Atlantic Palace involves questions outside the scope of the average lay person's general knowledge of the construction industry. The average person is unfamiliar with the standard of care applicable to a general contractor. The alleged defects in this case are not obvious acts of negligence. An average juror could not find liability on the part of Perini regarding its compliance with hundreds of pages of contract specifications, plans and shop drawings.

More importantly, an average juror could not determine which of these deviations, if any, caused the alleged problems with the structure without the aid of an expert. The complexity of the issues in this litigation are "so esoteric that jurors of common judgment and experience are unable to make a determination without benefit of an opinion presented by an individual with specialized knowledge." Macri v. Ames McDonough Co., 211 N.J. Super. 535, 642 (App.Div. 1986).

Finally, Perini has presented expert reports which they assert absolve them from negligence in the construction of the Atlantic Palace. The Intervenors can not rebut these experts without the aid of expert testimony. Accordingly, I respectfully recommend that summary judgment be entered in Perini's favor on the Intervenors' theory of liability for the negligent construction of the Atlantic

Palace.

C. Other Motions

The other motions before this court involve issues concerning claims for derivative liability arising out of S&W's alleged liability regarding the Atlantic Palace. Because the above holding recommends entering judgment in favor of S&W, the motions brought on behalf of Lindsey and I.C. Thomasson for summary judgment against the Intervenors are necessarily mooted. Accordingly, I recommend denying as moot I.C. Thomasson's motion for summary judgment and Lindsey's motion for summary judgment against the Intervenors.

D. Conclusion

For the foregoing reasons, I respectfully recommend granting Perini's and S&W's motion for summary judgment against the remaining Intervenors. I also recommend denying as moot I.C. Thomasson's

and Lindsey's motion for summary judgment against the Intervenors.

I am filing this Report and Recommendation with the Clerk of the Court and sending a copy of same to all counsel of record. Any objections to this Report and Recommendation must be filed within ten (10) days of service pursuant to General Rule 40D(5) and Rule 72(b), Fed.R.Civ. P.

Very truly yours,

/s/ Joel B. Rosen

JOEL B. ROSEN
United States Magistrate Judge

THE ATLANTIC PALACE
where new york avenue meets the boardwalk

227 Boardwalk • Atlantic City • New Jersey

March 31, 1987

Mange Chips
1 E Ridgewood
P.O. Box 547
Paramus, NJ 07652

Dear Mr. Chips:

Would you like to own an oceanfront condominium with outstanding value?

If that condominium was on the Boardwalk in the heart of Atlantic City's Casino Row amidst the glamour of the star studded shows and the glitter of the bustling casinos, would you still be interested?

If it was an elegant self-contained resort with all the amenities and conveniences of a fine hotel, would you be even more interested?

If so, you'll love the Atlantic Palace. It's in the heart of the action, yet when you're through with the action

you can enjoy all the benefits of your own exclusive resort. Consider:

- The Promenade Level - You will luxuriate in a year-round heated, indoor/outdoor swimming pool in a half acre garden-like setting overlooking the Boardwalk. Also there are saunas, hot tubs, steamroom, and exercise equipment to keep you fit and relaxed.

- The Boardwalk Level will feature a gourmet delicatessen and space for exclusive shops.

- The Atrium Level boasts additional exclusive shops as well as another restaurant and intimate lounge for your added convenience.

This palatial thirty story condominium now towers over the Atlantic City skyline. A limited number of residences - each with spectacular ocean views - are available at prices starting at $157,000 including complete decorator

furnishings and accessories.

Moreover, we have outstanding financing options.

Call me today, toll free 1-800-221-0515 for all the details on this exciting opportunity. In New Jersey, call 1-800-221-0513.

Sincerely,

/s/ Bill Hrisko
William C. Hrisko, Vice President
Director of Presales

P.S. Purchasing now and closing this spring allows you and your family to take advantage of the maximum tourist season.

MEMORANDUM

Meridian

To: Meridian Mortgage Loan Committee

Date: July 17, 1985

From: James F. Fogarty

Company: Meridian Mortgage

Subject: New Submission - Construction - Condominium
Loan Amount - $38,900,000
MMC Participation - $870,000

Atlantic Palace - 293 Units
Atlantic City, New Jersey

This is a request for a $870,000 participation in a $38,900,000 loan for the construction of the Atlantic Palace. The proposed project will consist of 293 dwelling units plus 28,372 S.F. of commercial space. The loan term will be 21 months with two three-month extensions at Central Penn's National Commercial Rate plus 1-1/2% reducing to 1% at such time as borrower achieves a firm 82% presale (240 units). Meridian Mortgage will be paid a

total of $152,500 for originating, servicing and participating in the loan.

The borrower will be Resort Development Corporation, a wholly owned subsidiary of U.S. Capital Corporation. U.S. Capital is the acknowledged leader in Resort Condominium development and finance on the east coast of the United States. At present, Central Penn has $1,056,624 outstanding to U.S. Capital on Getlinburg Summit III, a loan which MMC leads and which is being handled as agreed.

The project will consist of 293 living units with 208 suites, 54 one-bedroom units, 27 two-bedroom units and 4 penthouses. The proposed commercial space will involve 12 units located on both the Boardwalk as well as on the second story with a Boardwalk view. The dwellings will range in price from $141,492 to $359,000

with an average selling price of $172,000 and a total sellout of $50,403,072. The selling range of the commercial space will vary with its size and proximity to the Boardwalk with a projected sellout of $4,550,000.

Meridian Mortgage Corporation
555 East Lancaster Avenue
P.O. Box 6800
St. Davids, PA 19087
(215)293-9616

Meridian

Samuel J. Greenblatt
Senior Vice President

July 18, 1985

Resort Development Corporation
P.O. Box 11496
Columbia, SC 29211

Re: Atlantic Palace - 293 Condominium Units - Atlantic City, New Jersey

Gentlemen:

We are pleased to advise you that we have approved your application for land acquisition and construction financing, on the terms herein set forth. Upon receipt by us of a copy of this letter, executed and accepted by you, we agree to lend and you agree to borrow the amount set forth below on the following terms and conditions:

1. Loan. Meridian Mortgage Corporation ("Meridian") will lend the sum

of $38,900,000 for the term of twenty-one (21) months as follows:

(a) Until Borrower has presented to us satisfactory evidence of "sales" (as defined in paragraph 5 hereof) of at least 240 dwelling units, interest on the outstanding principal balance of the loan shall be due and payable on the first day of each calendar month at an interest rate of one and one-half (1 1/2%) percent above the National Commercial Rate of interest announced by Central Penn National Bank from time to time, which will be adjusted from time to time as such rate changes; and

(b) For the balance of the loan term, interest on the outstanding principal balance of the loan shall be due and payable on the first day of each calendar month at an interest rate of one (1%) percent above the National Commercial Rate of interest announced by Central Penn

National Bank from time to time, which will be adjusted from time to time as such rate changes.

Meridian Mortgage Corporation
555 East Lancaster Avenue
P.O. Box 6800
St. Davids, PA 19087
(215)293-9616

Meridian

James F. Fogarty,
Vice President

January 31, 1986

Perini Corporation
73 Mt. Wayte Avenue
Framingham, MA 01701

Re: The Atlantic Palace
New York Avenue and the Boardwalk
Atlantic City, New Jersey

Gentlemen:

This letter will advise you that we have entered into a Building Loan Agreement with Resort Development Corporation ("Borrower") for the purpose of financing the acquisition and construction of the above premises. You are serving as general contractor for the project under a contract in the amount of $27,000,000 (the "Construction Contract.").

Borrower has requested us to confirm

to you certain aspects of our loan to Borrower and we are willing to do so, provided that in no event shall the matters herein set forth make us responsible or liable to you or your subcontractors or suppliers for our disbursement of or failure to disburse the loan or any part thereof and neither you nor any of your subcontractors or suppliers shall have any right or claim against us (as a third party beneficiary or otherwise) under our Building Loan Agreement or by virtue of our administration thereof.

Subject to the foregoing qualifications, we confirm to you that we have allocated in our loan the sum of $26,419,425 in connection with the Construction Contract. The balance of funds required in order to pay for construction of the project under the Construction Contract, i.e., $580,575, is

required to be deposited with us by the Borrower to be disbursed by us. It is anticipated that Borrower will obtain such sums from cash deposits of unit purchasers at the Atlantic Palace by substituting a letter of credit for such cash deposits. We have agreed to provide such letter of credit. To date we have disbursed from the loan the sum of $1,096,880 in connection with sums due under the Construction Contract. To the extent you have received sums in excess of such amount, such sums have been paid from Borrower's funds. The balance of funds in the loan allocated to the Construction Contract is $25,322,545.

D E E D

THIS DEED is made on March 30, 1987, between RESORT DEVELOPMENT CORPORATION, a Delaware Corpration, having an office at 2727 Boardwalk, Atlantic City, New Jersey ("Grantor") and James P. Cheripka and Marguerite Cheripka, h/w, having an address at 165 Jerome Avenue, Paramus, NJ 07652 ("Grantee").

TRANSFER OF OWNERSHIP. The Grantor grants and conveys (transfers ownership of) the property described below to the Grantee. This transfer is made for the sum of One hundred seventy-two thousand and No/loo ($172,000.00). The Grantor acknowledges receipt of this money.

TAX MAP REFERENCE. (N.J.S.A. 46:15-2.1) Municipality of Atlantic City. Block 25, Lot 17, 18, 97, 100 and 119.

PROPERTY. The property consists of a condominium unit located in the City of Atlantic City, County of Atlantic, State

of New Jersey and is more particularly described as follows:

* * *

Being Condominium Unit No. 2910 in The Atlantic Palace. . .together with an undivided .003133 percentage interest in the common elements of The Atlantic Palace, a Condominium.

* * *

D E E D

THIS DEED is made on February 12, 1988, between RESORT DEVELOPMENT CORPORATION, a Delaware Corpration, having an office at 2727 Boardwalk, Atlantic City, New Jersey ("Grantor") and Gaetano Miele and Dorothy Miele, h/w, having an address at R.D.#1, Box 60, Lehighton, PA 18235 ("Grantee").

TRANSFER OF OWNERSHIP. The Grantor grants and conveys (transfers ownership of) the property described below to the Grantee. This transfer is made for the sum of Two hundred thirty-five thousand and No/1oo ($235,000.00). The Grantor acknowledges receipt of this money.

TAX MAP REFERENCE. (N.J.S.A. 46:15-2.1) Municipality of Atlantic City. Block 25, Lot 17, 18, 97, 100 and 119.

PROPERTY. The property consists of a condominium unit located in the City of Atlantic City, County of Atlantic, State

of New Jersey and is more particularly described as follows:

* * *

Being Condominium Unit No. 0601 in The Atlantic Palace. . .together with an undivided .512000 percentage interest in the common elements of The Atlantic Palace, a Condominium.

* * *

ZETLIN-ARGO STRUCTURAL INVESTIGATIONS, INC.

ATLANTIC PALACE

FINAL REPORT

Causes of Leakages

* * *

Wiss, Jenney, Elatner Associates, Inc.

CONDITION SURVEY

ATLANTIC PALACE SUITES

ATLANTIC CITY, NEW JERSEY

APRIL 5, 1991

At the request of Dr. Lev Zetlin-Argo Structural Investigations, Inc., Wiss, Janney, Elstner Associates, Inc. (WJE) performed a visual condition survey of visible exterior and interior surfaces at the Atlantic Palace Suites in Atlantic City, New Jersey. Observations at the building plaza area, probe openings and various tests were also performed under the direction of Morris Kaufmann (Zetlin

Argo).

The condition survey and field observations were performed from February 11 to March 13, 1991. WJE staff involved in the field effort were Kisball J. Beasley, Matthew C. >Farmer, James R. Triano, Jennifer P. Wentzien, and Steven V. Fechino. Structural Maintenance Systems, Inc. provided labor and equipment for scaffold access, testing, plus coring/probing and patching. Atlantic Palace Suites management assisted with access and information on active or past water leakage.

* * *

C. SUMMARY OF CONCLUSIONS

The Atlantic Palace residential units contain mechanical circulating air systems. These systems as designed and constructed are inadequate and inappropriate as ventilation systems, because of the following:

1. They do not comply with BOCA/84 requirements for natural ventilation:

a) Windows are fixed.

b) Doors, where these exist, are of inadequate size.

c) There are no other means of providing outside air into the residential units.

2. They do not comply with BOCA/84 requirements for mechanical ventilation.

a) The heat pump units have no outside air provisions, but serve as circulating units only.

b) Toilet recirculating units, as provided, violate BOCA/NMC-84 requirements prohibiting recirculation of toilet air.

c) No kitchen exhaust air system is provided.

3. They do not comply with ASHRAE standards (or other accepted practice):

a) No natural ventilation.

b) No mechanical ventilation.

4. They do not provide tenants with minimum requirements for comfort and health.

a) Lack of ventilation has contributed to growth of fungus (mold).

b) Lack of ventilation has contributed to existing unpleasant odors throughout the Tower.

THE ATLANTIC PALACE RESIDENTIAL UNITS WERE NOT PROVIDED WITH VENTILATION AIR AS DEFINED AND MANDATED BY THE CODES AND IN COMPLIANCE WITH ACCEPTED PRACTICE.

The Atlantic Palace

ATLANTIC CITY REPORT

ecember, 1986 Volume 1, Number

Atlantic Palace Will be Ready for Occupancy in February '87

FORECAST: Construction of Resort Development Corporation's Atlantic Palace is presently scheduled for completion by the end of 1986. Beginning in January, 1987, furniture will be installed in the 293 condominium apartments. Owners and their guests should be staying in the building by late February.

The Atlantic Palace luxury condominium resort, at New York Avenue and the Boardwalk in Atlantic City, will be ready for your inspection by late February, 1987.

Construction progress as of October 31:

- More than half of the tower—floors four through 18—is in the final stage of completion. Walls are being painted and wallpapered; carpets are being installed.
- In the rest of the tower—floors 19 through 30—drywall, cabinets and major appliances are being installed.
- Building safety systems—including smoke and fire alarms—are being tested.
- Work on level three, with its swimming pool and terrace, is in progress and on schedule.
- Site work is beginning. The preliminary steps for repaving New York Avenue are underway. Planters are being installed.
- The exterior of the building is being painted with its special protective coating.

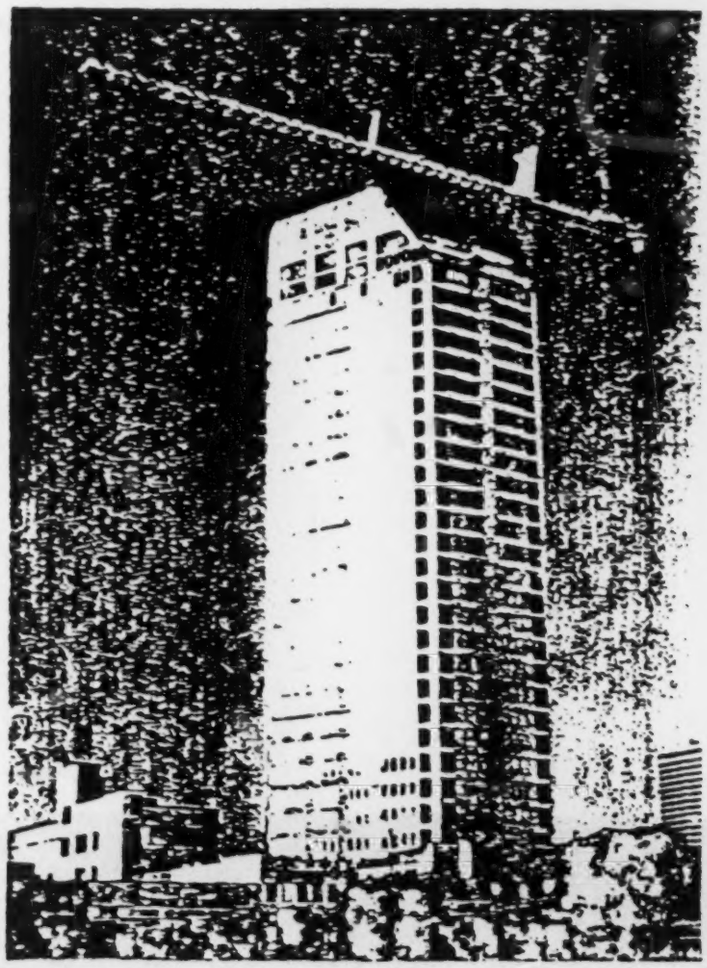
"By mid-November, we should begin locking up the lower floors, which means they are finished and inspected," says Don Points, executive vice president of Resort Development Corp. "The public areas on the first, second and third floors are being completed, and should finish up with the last of the living units."

The seven-level garage is just about complete. And the 11 commercial spaces will be ready to be finished and decorated by their owners.

Roger McElfresh is supervising the construction for the general contractor, Perini Corp., based in Framingham, Mass. "All our work is geared toward completing the building by mid- to late December, 1986," he says.

Furniture installation is scheduled to begin the first week of January, 1987, according to Don Points.

Soon, your Atlantic Palace luxury condominium, located in the center of the action on Atlantic City's Casino Row, will be ready for your enjoyment.



The 30-story Atlantic Palace, located on the Boardwalk in Atlantic City, is scheduled to open in February.

Atlantic Palace Sales Office Is Now at 2727 Boardwalk

The next time you come to see us, you'll notice—we've moved.

The sales office for both Resort Development Corp. properties in Atlantic City—The Enclave and The Atlantic Palace—is now at 2727 Boardwalk. That's Iowa Avenue and the Boardwalk.

We're in the Ritz Building, next to the Tropicana Hotel and Casino. Visitor valet parking is available at the Ritz. Just turn onto Iowa Avenue, head toward the beach, and pull into the circular driveway on your left, the main entrance to the Ritz. Then walk up to the Boardwalk and into our office.

Our phone numbers have not changed. You can call us toll-free at 1-800-221-0513 in New Jersey and 1-800-221-0515 outside of New Jersey. Our local phone number is 609-345-3900.

Don't hesitate to contact us.

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Supreme Court, U.S.
FILED
JUN 12 1995
OFFICE OF THE CLERK

No. 94-1889

In The

Supreme Court of the United States

October Term, 1994

GAETANO MIELE and DOROTHY MIELE, husband and wife, MARGUERITE CHERIPKA, Individually and on behalf of the Estate of James Cheripka,

Petitioners,

vs.

PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION and METALAN ERECTORS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENT METALAN ERECTORS, INC.

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STATEMENT OF THE CASE

This litigation arises out of the construction of a 293 unit condominium hotel in Atlantic City, New Jersey known as the "Atlantic Palace". Petitioners purchased condominium units at this project, and thereafter filed suit seeking damages for water infiltration problems throughout the Atlantic Palace building. United States Magistrate Judge Joel B. Rosen noted petitioners' suit was based solely on negligence theories of recovery. (PA 16A-PA 17A).[1] Petitioners failed to plead any theories of fraud or violation of federal law in their complaint. Jurisdiction of the United States District Court for the District of New Jersey, for the numerous actions filed as a result of this construction project, was based solely upon diversity of citizenship under 28 U.S.C. § 1332. The District Court granted petitioners the right to intervene in these matters.

Respondent Metalan Erectors, Inc. ("Metalan") performed work as a sub-sub-contractor on the Atlantic Palace project. Metalan's contractual duties required that it install metal window frames, sliding glass doors, a slope wall and a curtain wall at various floors of the condominium hotel. Metalan did not take part in the sale or advertising of the Atlantic Palace condominium units. Metalan is a fourth party defendant in petitioners' suit.

Following the close of discovery, the direct and third party defendants filed motions for summary judgment. Defendants based these motions on petitioners' failure to produce expert evidence to support their claims for professional malpractice against the architects and contractors of the Atlantic Palace project. Petitioners' original attorney conceded to the U.S. Magistrate Judge that New Jersey law required expert opinion

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1. The designation "PA" refers to petitioners' appendix. The specific page number referred to follows the designation.

testimony to support petitioners' claims. He further conceded that petitioners had not retained an expert for that purpose nor did they intend to do so. (PA21A-PA22A).

Due to the absence of expert evidence, the U.S. Magistrate Judge recommended the granting of summary judgment against petitioners. (PA39A-PA40A). Joseph E. Irenas, U.S.D.C., granted summary judgment on June 25, 1993. (PA7A-PA10A). The grant of summary judgment in favor of the defendants extinguished all claims against Metalan with the exception of one claim for indemnification which Metalan settled. The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court on December 29, 1994. (PA3A-PA4A).

SUMMARY OF THE ARGUMENT

I. Petitioners filed suit based solely on New Jersey common law theories of negligence. This matter does not involve a question of federal law or require this Court to settle differing interpretations of federal law within the circuit courts of appeal. This Court should not exercise its discretion to review this matter.

II. New Jersey common law requires petitioners to produce expert evidence to support their claims for negligence against a professional. Summary judgment was properly granted against petitioners due to the absence of any expert evidence to support their claims.

REASONS FOR DENYING THE WRIT

I.

THIS COURT SHOULD NOT EXERCISE ITS DISCRETION AND REVIEW A GRANT OF SUMMARY JUDGMENT BASED UPON NEW JERSEY NEGLIGENCE LAW.

In support of their petition for writ of certiorari, petitioners argue that the decision of the Third Circuit Court of Appeals conflicts with the decisions of other circuit courts of appeal with regard to federal law. Specifically, petitioners allege that the Third Circuit incorrectly interpreted 18 U.S.C. § 1341 and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701 through 1720. These assertions, however, are incorrect.

Petitioners fail to disclose that the suit filed in the United States District Court for the District of New Jersey did not allege statutory or common law fraud against any defendant. Petitioners' claims at the trial level proceeded solely on theories of negligence against the individuals responsible for the design, construction and supervision of the Atlantic Palace condominium project. Contrary to petitioners' assertion, it was not "plain that the petitioners' case was brought for defendants' fraud and non-disclosure." Petitioners sought relief solely for the alleged negligence of defendants and based solely on the tort law of the State of New Jersey. In fact, the petitioners first raised a claim of fraud on appeal to the United States Court of Appeals for the Third Circuit. At that time petitioners sought relief from the grant of summary judgment based upon New Jersey common law theories of fraud in the sale of real estate. Petitioners did not allege any violation of federal law at that time. Therefore, the Third Circuit could not have incorrectly decided an issue of federal law or made a decision contrary to other circuit courts of

appeal. Simply, no claim requiring interpretation of federal law was before the Third Circuit Court of Appeals. The only claim properly before the Third Circuit was the alleged error of the District Court in granting summary judgment based upon New Jersey negligence law. The Third Circuit determined that the District Court properly granted summary judgment and this Court should not exercise discretion to review that determination.

Alternatively, should this Court grant review of this matter based upon the asserted error in the interpretation of federal statutes governing fraud, respondent Metalan requests that this matter be limited solely to that issue. Respondent Metalan took no part in the advertising or sale of condominium units at the Atlantic Palace project. Metalan requests that, should this Court grant certiorari, it be limited solely to petitioners' claim regarding the fraudulent sale of condominium units and they not be required to participate in any further litigation in this matter.

II.

THE THIRD CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT AGAINST PETITIONERS' CLAIMS BASED ON NEGLIGENCE.

A court may grant summary judgment only when the materials of record show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Tudor Dev. Group Inc. v. United States Fidelity & Guaranty Co.*, 968 F.2d 357, 359-360 (3d Cir. 1992). A motion for summary judgment must be granted if the party opposing the motion "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrept*, 477 U.S. 317, 322 (1986).

In this case it was essential for petitioners to establish, through expert evidence, negligent conduct of the respondents. Petitioners alleged in their complaint negligent construction, design, supervision and failure to discover defects in a timely fashion. Petitioners asserted these claims against the general contractor and architect on the Atlantic Palace condominium project. Petitioners were required to produce expert evidence in support of these claims. In a professional malpractice action, New Jersey law requires expert testimony from a member of defendant's professional group to establish deviation from the accepted standard of professional care. *Sanzari v. Rosenfeld,* 34 N.J. 128 (1961); *Walker Rogge v. Chelsea Title and Guaranty,* 222 N.J. Super. 363, 375-376 (App. Div. 1980), *reversed on other grounds,* 116 N.J. 517 (1989); *Travelers Indemnity Co. v. Ewing, Cole, Erdman & Eubank,* 711 F.2d 14, 17 (3d Cir. 1983). Without such testimony, plaintiff cannot sustain its burden of establishing a *prima facie* case of negligence against a professional. *Walker Rogge v. Chelsea Title & Guaranty,* 222 N.J. Super. at 375.

In this case petitioners' original attorney conceded that he was required to retain an expert to proceed with petitioners' claims at the trial court level. Petitioners' original attorney further conceded that he had not retained an expert for that purpose nor did he intend to do so. Petitioners, therefore, conceded that they could not put forth the necessary proofs to prevail at trial. In light of this clear lack of evidence in support of petitioners' claims, the District Court properly granted summary judgment. The Third Circuit Court of Appeals properly affirmed this determination.

CONCLUSION

For the foregoing reasons, respondent Metalan Erectors respectfully requests that this Court deny a writ of certiorari on this matter. Alternatively, respondent Metalan Erectors requests that if this Court grants certiorari as to petitioners' claim of fraud in the sale of condominium units, it be limited solely to that issue and they be removed from any further participation in this matter.

Respectfully submitted,

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(3)

No. 94-1889

Supreme Court, U.S.
FILED
JUN 13 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

GAETANO MIELE and DOROTHY MIELE, husband and wife; MARGUERITE CHERIPKA, Individually and on behalf of the Estate of James Cheripka,

Petitioners,

v.

PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION, AND METALAN ERECTORS, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the District Court, and the United States Court of Appeals for the Third Circuit, appropriately determined that Respondents were entitled to Summary Judgment, where Petitioners failed to proffer expert testimony in support of their allegations of negligence and breach of warranty against the general contractor and the architect.

COUNTERSTATEMENT OF PARTIES

Petitioners have needlessly confused the parties. The only appropriate parties to this Petition are the Petitioners, who are intervention plaintiffs, Perini Corporation, the general contractor, and Stevens & Wilkinson, Inc., the architect. Meridian Mortgage Corporation, the Atlantic Palace Condominium Association and Metalan Erectors, Inc., were not parties to the Appeal to the Third Circuit, and are not appropriate parties in this matter.

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A. The Decision by the District Court in Granting Summary Judgment, and the affirmance by the United States Court of Appeals for the Third Circuit, was correct and not in conflict with any decisions of this Court with respect to summary judgment motions in civil actions..... 2

B. The other issues raised by Petitioner were not pleaded or argued at the Trial Court, or argued at the Court of Appeals level, and exceptional circumstances do not exist to warrant review of said claims in the United States Supreme Court..... 4

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U.S. v. Alvarez-Sanchez, 114 S.Ct. 1599 (1994) 4

STATUTES CITED

Interstate Land Sales Act, *15 U.S.C. § 1701, et seq.* 4

18 U.S.C. § 1341 4

COUNTERSTATEMENT OF THE CASE

In this matter, Petitioners were permitted to intervene at the trial level, along with eleven (11) other condominium unit owners of the Atlantic Palace Hotel-Condominium Complex, in *Donald W. Wright, et al. v. Perini Corp., et al.*, Civil Action Number 90-189 (JEI) (consolidated), a suit by approximately 200 unit owners, which had been brought against Respondents Perini Corporation, the general contractor of the Atlantic Palace, and Stevens & Wilkinson, the Atlantic Palace's architect. The *Wright* suit, and the Petitioner-Intervenors, alleged negligence and breach of warranty in the construction and design of the complex.

After an extensive mediation process, only the Petitioners proceeded with the action, as the remaining parties to the consolidated actions settled their claims.

The United States Magistrate Judge who was managing discovery ordered the remaining parties to comply with deadlines with respect to submission of experts' reports. Despite Petitioners' acknowledgement that "the liability, causation and damages issues require expert testimony," (Pa. 19)[1] the Petitioners failed to submit experts' reports in support of their allegations of negligence and breach of warranty against Respondents, the general contractor and architect of the condominium project.

On June 25, 1993, the Honorable Joseph E. Irenas, U.S.D.J., granted Respondents' Motion for Summary Judgment against Petitioners. By Judgment Order dated

---

[1] "Pa" refers to Petitioners' Appendix.

December 29, 1994, without Opinion, the United States Court of Appeals for the Third Circuit affirmed the District Court's grant of Summary Judgment in favor of Respondents.

ARGUMENT

THE WRIT SHOULD BE DENIED BECAUSE THE LOWER COURTS' DECISION GRANTING, AND AFFIRMING, SUMMARY JUDGMENT IS CORRECT, AND DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT, AND THE OTHER ISSUES RAISED BY PETITIONERS WERE NEVER PLEADED IN THE DISTRICT COURT, AND NEVER ARGUED IN EITHER THE DISTRICT COURT OR THE COURT OF APPEALS

A. The Decision by the District Court in Granting Summary Judgment, and the affirmance by the United States Court of Appeals for the Third Circuit, was correct and not in conflict with any decisions of this Court with respect to summary judgment motions in civil actions.

As the United States Magistrate Judge who authored the Report and Recommendation dated June 17, 1993, recognized, petitioners faced a significant burden in attempting to prove negligence and breach of warranty with respect to the construction and design of a 30 story hotel-condominium complex. While the fact of water infiltration was admitted by all, the causes of the infiltration, whether by design, engineering or construction, were hotly contested. Respondents had proffered substantial and lengthy expert reports disputing their liability; the general contractor blamed the designers, the

designers blamed construction. The Trial Court's decision to grant Summary Judgment, and the Court of Appeals' affirmance of that decision, was consistent with the legal principles set forth in this Court's recent trio of summary judgment cases, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The Trial Court, properly applying the legal principles set forth in the above cases, determined that without expert testimony, petitioners would be unable to produce substantive evidence that either or both of the Respondents failed to design or construct the project in an appropriate manner. Without the benefit of expert testimony, the Trial Court concluded that the jury would be set adrift with respect to the causes of the water infiltration, and the fault, if any, of the Respondents. As this Court stated in *Anderson, supra*, 477 U.S. at 252:

> If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

In this case, without expert testimony, Petitioners could not carry the burden of proving who, if anyone, was at fault.

B. The other issues raised by Petitioner were not pleaded or argued at the Trial Court, or argued at the Court of Appeals level, and exceptional circumstances do not exist to warrant review of said claims in the United States Supreme Court.

Petitioners raise, for the first time, allegations that Respondents breached the Interstate Land Sales Act, *15 U.S.C. § 1701, et seq.*, and the criminal statute dealing with frauds and swindles by mail, *18 U.S.C. § 1341*. Allegations concerning those statutes were never pleaded by Petitioners in the District Court, and never argued in either the District Court or the Court of Appeals. No exceptional circumstances exist to warrant review of these new claims in the United States Supreme Court. *U.S. v. Alvarez-Sanchez*, 114 S.Ct. 1599 (1994).

Petitioners also argue, again for the first time, that the District Court and the Third Circuit erred in failing to consider Petitioners' rescission claims. Petitioners never pleaded rescission in the District Court, and never argued for rescission there or in the Court of Appeals. Accordingly, the United States Supreme Court need not review said claim. *Id.*

CONCLUSION

For the foregoing reasons, Respondents Perini Corporation and Stevens & Wilkinson, Inc. respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Dated: June 13, 1995

(4)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-1889

Supreme Court, U.S.
FILED
JUN 14 1995
OFFICE OF THE CLERK

GAETANO MIELE and DOROTHY MIELE, husband and wife; MARGUERITE CHERIPKA, Individually and on behalf of the Estate of James Cheripka,

Petitioners,

v.

PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION, AND METALAN ERECTORS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

Brief of Respondent, Meridian Mortgage Corporation, in Opposition To Petition For A Writ Of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

Questions 1, 2, 3a and 3c presented in the Petition were not raised in the Court of Appeals for the Third Circuit or the District of New Jersey. Compare the Statement of Issues in Petitioners' Brief filed in the Third Circuit, a copy of which is attached to this Brief at Supplemental Appendix, page 1B, and the decision of the District of New Jersey at pages 5A-40A of the Appendix to Petition for Writ of Certiorari. As set forth below, the writ should be denied on those Questions, since they have been waived.

The only Question properly before this Court is:

Did the Court of Appeals for the Third Circuit correctly find that the District of New Jersey properly granted summary judgment against the Petitioners/intervenors because they failed to proffer necessary expert

testimony in support of their claims of construction and design defects?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT AND THE DISTRICT OF NEW JERSEY.

While Meridian Mortgage Corporation ("Meridian") is listed as a Respondent in the caption chosen by Petitioners and in their list of parties, it was not a party in Petitioners' intervenor complaint styled Portagallo, et al. v. Perini Corporation and Stevens and Wilkinson, Inc. and filed in the District of New Jersey with Wright, et al. v. Perini Corp., et al., Civil No. 90-189. See Appendix to Petition for Writ of Certiorari, pages 14A-17A. Meridian was not named as a defendant in the Wright case, but was joined as a fourth party defendant by third party defendants joined by defendants Perini Corp. and Stevens & Wilkinson, Inc. Nevertheless, the plaintiffs in Wright, including Petitioners, Gaetano and Dorothy

Miele, and the other Petitioners made no claims against Meridian.*

Meridian is a wholly owned subsidiary of Meridian Bank, a publicly held bank holding company located in the Commonwealth of Pennsylvania.

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* Petitioners erroneously include U.S. Capital Corporation, First Resorts of New Jersey, Inc., John Doe, XYZ Corporation and other unnamed parties as defendants in the Wright case. In fact, none of those entities or individuals was named as a defendant in the Wright case or in any other case consolidated with Wright or in the intervenor complaint.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

No. 94-1889

GAETANO MIELE and DOROTHY MIELE, husband and wife; MARGUERITE CHERIPKA, Individually and on behalf of the Estate of James Cheripka,

Petitioners,

v.

PERINI CORPORATION, MERIDIAN MORTGAGE CORPORATION, STEVENS & WILKINSON, INC., ATLANTIC PALACE CONDOMINIUM ASSOCIATION, AND METALAN ERECTORS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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Brief of Respondent, Meridian Mortgage Corporation, in Opposition To Petition For A Writ Of Certiorari

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Respondent, Meridian Mortgage Corporation, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Court of Appeals for the Third Circuit's Judgment Order affirming the District Court's grant of summary judgment dismissing Petitioners' claims.

STATEMENT OF THE CASE.

The Atlantic Palace Condominium ("Atlantic Palace") is a high-rise (in excess of thirty stories) building located at New York Avenue and The Boardwalk in Atlantic City, New Jersey. Construction began on the Atlantic Palace in 1985 and was substantially completed in 1987. The owner and developer of the Atlantic Palace was Resort Development Corp. ("RDC"), who marketed and sold the 293 residential units in the Atlantic Palace as a condominium/ hotel.[1] Perini Corporation ("Perini") was the general contractor for the Atlantic Palace, and Stevens & Wilkinson, Inc. ("S&W") was the architect. The condominium is operated by the Atlantic Palace Condominium Association ("APCA") made up of

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[1] The Atlantic Palace also had a number of condominium units for commercial purposes.

all the owners of the condominium units, including Petitioners who purchased their units from RDC after construction of the Atlantic Palace was substantially complete.

Meridian was the construction lender for the Atlantic Palace. It did not market or sell the condominium units to Petitioners or to the public. After water infiltration and ventilation problems at the Atlantic Palace became apparent, Meridian began two actions in 1989. One action, Meridian Mortgage Corp. v. Perini Corp., et al., Civil Action No. 90-304 (D.N.J.), was against Perini and S&W, and the other, Meridian Mortgage Corp. v. Fidelity and Deposit Company of Maryland, et al., Civil Action No. 90-305 (D.N.J.), was against Perini's two bonding companies.[2] RDC also

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[2] Meridian's actions were originally filed in the United States District Court for the Eastern District of Pennsylvania and were transferred to the District of New Jersey.

filed an action against Perini, S&W and one of Perini's bonding companies, Resort Development Corp. v. Perini Corp., et al., Civil Action No. 89-4973 (D.N.J.).[3] Additionally, APCA filed an action against Perini and S&W, Atlantic Palace Condominium Association v. Perini Corp., et al., Civil Action No. 90-1003 (D.N.J.). All four actions sought damages for alleged negligence and breach of warranty in the design and construction of the Atlantic Palace.

On January 19, 1990, approximately 164 owners of individual condominium units at the Atlantic Palace, including Petitioners, Gaetano and Dorothy Miele, filed an action against Perini and S&W alleging negligence and breach of warranty in the design and

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[3] RDC's action was originally filed in the District of South Carolina and transferred to the District of New Jersey. RDC filed for bankruptcy in 1989 and did not actively participate in the litigation after its bankruptcy.

construction of the Atlantic Palace, Wright, et al. v. Perini Corp., et al., Civil Action No. 90-189 (D.N.J.).[4] Meridian was not named as a defendant in the Wright case but was added as a fourth party defendant by certain subcontractors who were joined as third party defendants by Perini or S&W. There were no fraud or misrepresentation claims, or claims under any federal statute, made in any pleadings in the Wright case or in any of the pleadings in the other consolidated cases. On April 26, 1990, the five cases relating to the Atlantic Palace and pending in the District of New Jersey were consolidated for case management and discovery purposes.

On October 24, 1990, Magistrate Judge Joel Rosen of the District of New Jersey granted to thirteen owners, including

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[4] The Mieles are identified as plaintiffs in the Wright caption and in Paragraph 12 of the Wright Complaint.

Petitioners James and Marguerite Cheripka, as well as Gaetano and Dorothy Miele, the right to intervene in the Wright action. On November 13, 1990, a separate intervention complaint was filed which mirrored the claims made in the Wright complaint. Counts I and II of the intervenor complaint alleged that Perini's construction of the Atlantic Palace was performed in a negligent manner, and that Perini negligently deviated from the construction contract, as well as from existing building and design standards. In Count III, the intervenors alleged that S&W failed to properly design and supervise the construction of the Atlantic Palace. In Counts IV and V, the intervenors contended that S&W breached its duty to supervise the construction of the work and failed to discover the defects in the contractors' work in a timely fashion. Count V stated

that S&W breached warranty claims under their contracts.[5]

Following the intervention order, the intervenors unsuccessfully attempted to amend their complaint to add new parties and additional claims. On May 28, 1991, Magistrate Judge Rosen denied the intervenors' motion to amend their Complaint to name additional parties and additional causes of action. Some four months later, intervenors again moved to amend their complaint, but that motion was also denied on September 25, 1991. Thereafter, intervenors moved to dismiss or withdraw their intervenor complaint. Magistrate Judge Rosen denied that motion on December 2, 1992. Petitioners failed to appeal those

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[5] The caption of the intervenor complaint is Portagallo, et al. v. Perini Corporation, et al., and even though it refers to the docket numbers of four of the five consolidated cases, the Magistrate Judge limited the intervention to the Wright case.

decisions to the Third Circuit, and they do not raise them in their Petition to this Court.

Following three days of court ordered mediation in July, 1992, all parties in the consolidated actions and all intervenors, except Petitioners, eventually agreed to settle all claims. The settlement was finalized on September 8, 1993, and included the creation of a fund of over $14,000,000 to repair the Atlantic Palace, as well as refinancing opportunities for mortgages on individual condominium units provided by Meridian.[6] As part of the settlement, all parties to the settlement released each other, except Meridian did not release unit owners in order to protect its mortgages on individual condominium units.

Rejecting the settlement, Petitioners proceeded with their action against Perini

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[6] Meridian did not contribute to the settlement fund.

and S&W. In scheduling orders issued by the Magistrate Judge (18A-22A), Petitioners were required to submit their experts' reports by July 1, 1991, and Perini and S&W were required to submit their experts' reports by October 1, 1991. Despite Petitioners' acknowledgement that their claims cannot be established without the aid of the liability, causation and damages issues expert testimony, they did not submit experts' reports.[7] See Appendix to Petition for Writ of Certiorari at p. 33A.

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[7] Petitioners' reference to the report of Zetlin-Argo on page 8 of the Petition is both misleading and misstated. Dr. Lev Zetlin, who died at the beginning of 1993, was hired by Meridian (not APCA) after litigation ensued to determine the cause of water infiltration and other defects and to testify at trial, after Perini, S&W and RDC had failed to identify the cause of the problems at the Atlantic Palace or to fix them after many attempts. The report encompasses six volumes, plus calculations and photographs, but Petitioners have supplied only a few pages in the Appendix. The Zetlin-Argo report does not identify Meridian as a cause of the defects.

On December 2 and 3, 1992, Perini and S&W, respectively, moved for summary judgment seeking to dismiss all claims asserted against them by Petitioners. Perini and S&W argued that the Petitioners' failure to proffer expert testimony was fatal to their negligence claims, therefore mandating their dismissal.[8]

On June 25, 1993, the Honorable Joseph E. Irenas, U.S.D.J., adopted Magistrate Judge Rosen's Report and Recommendation, and granted Perini and S&W's motions for summary judgment dismissing Petitioners' claim with prejudice. On December 1, 1993, the District Court, as a result of the settlement and summary judgment, entered final judgment dismissing all claims with

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[8] The District Court dismissed the breach of warranty claims as the Petitioners did not have a contractual relationship with Perini or S&W. Consequently, the District Court found that the contracts are only relevant insofar as any negligent deviation therefrom could be used to support Petitioners' negligence claims.

prejudice of all parties to the five consolidated actions. The Third Circuit affirmed the District Court by Judgment Order dated December 16, 1994.

SUMMARY OF THE ARGUMENT.

Petitioners had an opportunity to litigate the issues raised in the intervenor complaint but failed to present expert testimony to support their claims. On appeal and on this Petition, they have raised additional issues, not raised in the District Court or Third Circuit. They have presented no reasons why those issues should be heard by this Court.

REASONS WHY THE WRIT SHOULD BE DENIED.

I.

Neither The Decision Of The Court Of Appeals Or The District Court Nor The Record Raise The Questions Presented By This Petition.

It is the longstanding policy of this Court that "[w]here issues are neither raised before nor considered by the Court of Appeals, the [Supreme] Court will not ordinarily consider them." Adickes v. S.H. Kress and Co., 398 U.S. 144, 147 n.2, 90 S.Ct. 1598, 1602 n.2 (1970). It also seems clear that if an appellant lists an issue in the "Statement of Issues", and thereafter fails to pursue it in the "Argument", the Court of Appeals considers the point abandoned. Nagle v. Alspach, 8 F.3d 141, 143 (3d. 1993). Likewise, if an appellant fails to raise the issue in the "Statement of Issues", but argues the point in the body

of the brief it will be considered waived. See also Lunderstadt v. Colafella, 885 F.2d 66, 78 (3d Cir. 1989) (citing Fed. R. App. P. 28(a)(3) and (5), which require appellant's brief to contain a "statement of issues presented for review" and, in the argument, "the contentions of the appellant on the issues presented"); 16 Charles A. Wright, Federal Practice and Procedure § 3974, at 421 (1977 and Supp. 1994, at 690) (issue must be raised in both the "Issues" and the "Argument" sections of the brief); Accord Kost v. Kozakiewicz, 1 F.3d 176, 182-83 n.3 (3d Cir. 1992). Clearly, the Supreme Court will not consider issues which were not raised and determined in the Court of Appeals or District Court. Furthermore, Questions Presented but not argued or arguments not encompassed in the Questions Presented will not form the basis of the grant of a Writ of Certiorari.

Petitioners' Questions Nos. 1 and 2 involving the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701, et seq., and the federal criminal statute punishing mail fraud, 18 U.S.C. § 1341, were not raised to the Third Circuit. See the Supplemental Appendix attached to this Brief which is the Statement of Issues from Petitioners' Brief in the Third Circuit. Moreover, these statutes were not raised in the District Court or argued in the summary judgment proceeding. (Appendix to Petition for Writ of Certiorari at pp. 11A-40A.) As set forth in the Magistrate's Report and Recommendation, Petitioners' intervenor complaint alleged only claims based on negligence and breach of warranty against the architect (S&W) and the general contractor (Perini) of the Atlantic Palace. (Appendix to Petition for Writ of Certiorari at pp. 16A-17A.)

This Court has repeatedly declined to hear arguments which have been raised for the first time in a Petition for a Writ of Certiorari. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 34, 39, 109 S.Ct. 2872, 2989 (1989) (the Court will not consider an argument resting on grounds which were not raised below barring exceptional circumstances); Price Waterhouse v. Hopkins, 490 U.S. 237, 240 n.5, 109 S.Ct. 1775, 1785 n.5 (1989) (the Court will not address an argument concerning a statutory violation because it was not made to the courts below); DeShaney v. Winnebago County DDS, 489 U.S. 193, 195 n.2, 109 S.Ct. 998, 1003 n.2, (1989) (the Court refused to consider argument that the Wisconsin Child Protection Statutes gave an abused child an "entitlement" to receive protective services in accordance with the terms of the statute because this argument was made for the first time in petitioner's brief to the Court.)

Even if Petitioners had presented their arguments about mail fraud violations pursuant to 18 U.S.C.A. § 1341, to the Third Circuit or the District Court, summary judgment would have still been granted because no private right of action exists for mail fraud under the federal statute. See Creech v. Federal Land Bank of Wichita, 647 F.Supp. 1097, 1099 (1986). Both cases relied on by Petitioners, United States v. Rendini, 738 F.2d 530 (1st Cir. 1984) and United States v. Amrep Corp., 560 F.2d 539 (2nd Cir. 1977), involved criminal prosecutions and do not provide any support to Petitioners' argument.

Similarly, Petitioners' argument under the Interstate Land Sales Full Disclosure Act must fail because Congress specifically exempted the sale or lease of improved land under § 1702:

> (a) Unless the method of disposition is adopted for the purpose of evasion of this chapter, the provisions of this chapter shall not apply to -
>
> * * * *
>
> (2) the sale or lease of any improved land on which there is a residential, commercial, condominium, or industrial building, or the sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years.

In their Petition (p. 21), Petitioners admit that they purchased "furnished units in a vertical condominium." In the case relied on by Petitioners, Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444, 1450 (11th Cir. 1985), the Court held that "[i]f at the time the purchaser signs the contract there exists a condominium building...the sale is exempt from the Act." Id. Thus, even if Petitioners had presented their argument concerning the Interstate Land Sales Full Disclosure Act to the Third Circuit or the District Court, summary judgment would still

have been granted because the Act was not applicable to this case.

II.

The Petition Fails To Raise Any Basis For Granting A Writ of Certiorari.

Even if the other "Questions Presented" and arguments were clear, consistent and raised in both the "Questions" and arguments, Petitioners fail to present any grounds for granting their Petition. First, Petitioners argue (pp. 24-26 of the Petition) that summary judgment was granted because they refused to join the settlement. The reasons why summary judgment was granted are fully set out in the Magistrate Judge's Report and Recommendation (pp. 11A-40A). There is nothing that says or suggests the grant of summary judgment was based on Petitioners' refusal to settle.

Second, Petitioners suggest that summary judgment was granted without

granting them a continuance (p. 26 of the Petition). They do not suggest what they would have done with the additional time. But at oral argument on the motion for summary judgment, Petitioners' counsel (Mr. Ferry) indicated that he had not attempted to retain an expert and had no present intention to do so. (Appendix to Petition at p. 22A.) Moreover, as the Magistrate Judge noted, Petitioners' counsel had failed to show "good cause", required by Rule 16(b), Fed.R.Civ.P., for a change in the scheduling order. (Appendix to Petition at p. 22A, n.5.) The simple truth is that Petitioners failed to ask for a continuance because they did not want one.

Third, Petitioners appear to argue that they did not need an expert because their case was brought for fraud and non-disclosure. It is clear from the Magistrate Judge's description of their intervenor complaint that Petitioners' claims did not

involve fraud or non-disclosure, but rather negligence and breach of warranty against the only defendants that they named, Perini and S&W.[9] (Appendix to Petition at pp. 16A-17.) Petitioners do not explain how they can prove negligence and breach of warranty in the construction of a high-rise building without an expert. Furthermore, such an issue in this diversity case is controlled by New Jersey state common law, and neither the constitution nor the laws of the United States are implicated.

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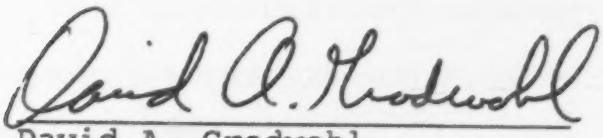
[9] Petitioners continue to refer to "defendants" in their Petition without fully explaining whom the "defendants" are other than Perini and S&W.

CONCLUSION.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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SUPPLEMENTAL APPENDIX

STATEMENT OF THE ISSUES

1. If defendants, including Perini as general contractor and Meridian as lead lender, had knowledge at the outset of construction defects and the existence of such defects and building violations was not disputed, should the cases of the plaintiff unit owners have been dismissed for an anticipated lack of additional expert testimony at the trial?

2. Where the essential element of the unit owners' cases was knowledge at the outset of the water infiltration and ventilation defects, and the principal theory of the pleadings was nondisclosure to and fraud on the purchasing unit owners, and the building violations existed in the non-settling plaintiffs' own units and were provable by ample fact witnesses and by admissions obtained in depositions of defendants' witnesses, was it appropriate for the trial court to grant summary judgment under FRCP 56 on defendants' motions?

3. Where plaintiff unit owners had found that the terms of a mediated settlement were not adequate to compensate for their losses, and were essentially defenseless by reason of their attorney's involvement in the settlement (in the interests of his settling clients), should the Court have imposed the drastic sanction of dismissal of the cases of the non-settling plaintiffs?

4. Where the non-settling plaintiffs' attorney in the trial court was faced with a conflict in respect of the responses of his 12

unit-owner clients to a mediated settlement proposal, should the Court have dealt with the practical problem presented by recognizing that the same attorney was unable under FRCP 56(f) to resist the defendants' motions for summary judgment or to present by affidavit facts essential to justify opposition to the motion? Should the Court under the circumstances presented by the conflict have ordered the attorney to withdraw and thereby have permitted the non-settling plaintiffs to defend against the defendants' summary judgment motions with new counsel?

STATEMENT OF THE CASE

Appellants are three condominium unit owners who purchased premises at the Atlantic Palace Condominium, located on the Boardwalk in Atlantic City. The Mieles purchased their unit #601 for $235,000 by deed dated February 12, 1988, at 34a. The Cheripkas purchased their unit #2910 for the sum of $172,000 by deed dated March 10, 1987. 33a. The Mieles obtained a purchase money mortgage from defendant, Meridian Mortgage Corp.; the Cheripkas obtained financing elsewhere.[1] The Hastings purchased Unit #2601 for $259,000.

The Mieles and the Cheripkas were part of a group of unit owners known as the "Portogallo group", consisting of a group of about 12 purchasers of individual units; the "Portogallo group" was represented by an Atlantic City attorney, Frank J. Ferry, Esq.

On April 11, 1990, Mr. Ferry filed a 17-count complaint in the Superior Court of New Jersey, Chancery Division, Atlantic County,

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1. Shortly prior to the filing of the notice of appeal, plaintiff James P. Cheripka died, survived by his wife. Marguerite Cheripka is also known as Marge Chips and she is referred to as such in the appendix.